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The Expanding Limits of Prosecutorial Discretion: Ramalingam Ravinthran v Attorney-General [2012] SGCA 2

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***Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2**

The context

The applicant was convicted of drug trafficking under the Misuse of Drugs Act[1] and sentenced to hang. His appeal to the Court of Appeal was unsuccessful, but he filed a Criminal Motion to reopen judgment. He alleged a violation of his right to equality guaranteed by the Constitution of the Republic of Singapore;[2] the alleged violation occurred when another accused who was involved in the same criminal enterprise (both had trafficked the same bag containing the drugs) was charged with trafficking in an amount of drugs quantified just below the threshold for the mandatory death penalty, while the accused was charged with trafficking in an amount that would lead to the mandatory death penalty if convicted.[3] The Criminal Motion was dismissed.

Although the Criminal Motion also involved the procedural issue of *functus officio* and the principle of finality,[4] this piece focuses on the substantive issue of an accused's constitutional right to equality in light of the Attorney-General's constitutional power of prosecutorial discretion. The former is captured by Art 12(1), which states:

> All persons are equal before the law and entitled to the equal protection of the law.

The latter is found in Art 35(8), which states:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

Court's review of the jurisprudence

The Court of Appeal identified four key precedents that might have shaped the outcome of the substantive issue, but pointed out their limited utility. The first case was *Ong Ah Chuan v*

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[1] Cap 185, 2001 Rev Ed.
[2] 1985 Rev Ed, 1999 Reprint.
[3] *Ramalingam Ravinthran* at [2].
[4] *Ramalingam Ravinthran* at [9]–[18].

Public Prosecutor,[5] which the Court of Appeal said was distinguishable because it involved "the application of Art 12(1) of the Constitution to [mandatory death penalty] legislation, and not to the exercise of the prosecutorial discretion".[6] The Court of Appeal further noted that the "test of what equality before the law requires is not necessarily the same in both situations."[7]

The second case was *Teh Cheng Poh v Public Prosecutor*, which stood for the principle that equality before the law only requires the Attorney-General to give unbiased consideration to all offenders in criminal cases, and that irrelevant considerations should not be factored in when exercising his prosecutorial discretion.[8] However, this case was also distinguishable because "it was concerned with the exercise of the prosecutorial discretion in relation to a single offender whose acts were punishable under two different statutory regimes carrying different punishments."[9]

The third case, *Sim Min Teck v Public Prosecutor*,[10] while relevant insofar as it was "concerned with the prosecutorial discretion to differentiate between the charges against two offenders who were, in law, liable for the same criminal acts", had applied the principle in *Teh Cheng Poh* "uncritically without considering the material difference between the factual situations in the two cases."[11]

The fourth case, *Thiruselvam s/o Nagaratnam v Public Prosecutor*,[12] was similarly cloaked with doubt because of its uncritical application of *Teh Cheng Poh*; more than that, the case had suggested that the Attorney-General can charge an accused with a capital offence and another accused with a non-capital offence even if the former had played a lesser role in the criminal enterprise and was therefore less morally blameworthy.[13]

The decision and some observations on it

Given the lack of assistance offered by the aforementioned precedents, the Court of Appeal had to refer to first principles. Citing *Law Society of Singapore v Tan Guat Neo Phyllis*[14] and *Yong Vui Kong v Attorney-General*,[15] the Court of Appeal held that:

> In view of the co-equal status [of the Attorney-General and the Judiciary], the separation of powers doctrine requires the courts not to interfere with the exercise of the prosecutorial discretion unless it has been exercised unlawfully.[16] The prosecutorial power is part of the executive power, although, under existing constitutional practice, it is independently exercised by the Attorney-General as the Public Prosecutor. In view of his high office, the courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of whether he was acting alone or in concert with other offenders), the Attorney-General does so in accordance with the law.[17]

[5] [1979–1980] SLR(R) 710.
[6] *Ramalingam Ravinthran* at [40].
[7] *Ramalingam Ravinthran* at [20].
[8] [1979] 1 MLJ 50 at 56.
[9] *Ramalingam Ravinthran* at [40].
[10] [1987] SLR(R) 65.
[11] *Ramalingam Ravinthran* at [40].
[12] [2001] 1 SLR(R) 362.
[13] *Thiruselvam s/o Nagaratnam* at [32].
[14] [2008] 2 SLR(R) 239 at [144].
[15] [2011] 2 SLR 1189 at [139].
[16] The word "unconstitutionally" was used in the previous paragraph: *Ramalingam Ravinthran* at [43].
[17] *Ramalingam Ravinthran* at [44].

The Court of Appeal, however, reiterated that "all legal powers are subject to limits", and that an "inherent limitation on the prosecutorial power is that it may not be exercised arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose."[18] It then held that:

> In cases where several offenders are involved in the same or similar offences committed in the same criminal enterprise… the Attorney-General… may take into account a myriad of factors in determining whether or not to charge an offender (including his co-offenders in the same criminal enterprise, if any) and, if charges are to be brought, for what offence or offences. These factors include the question of whether there is sufficient evidence against the offender and his co-offenders (if any), their personal circumstances, the willingness of one offender to testify against his co-offenders and other policy factors. Where relevant, these factors may justify offenders in the same criminal enterprise being prosecuted differently.
>
> … the Prosecution is obliged to consider, in addition to the legal guilt of the offender, his moral blameworthiness, the gravity of the harm caused to the public welfare by his criminal activity, and a myriad of other factors, including… the possibility of showing some degree of compassion in certain cases.[19]

On the facts, the Court of Appeal dismissed the substantive aspect of the Criminal Motion on three grounds: (1) the applicant was unable to produce any evidence to prove a *prima facie* case of a violation of Art 12(1) – pointing to the mere differentiation of charges does not suffice as differentiation may be legitimately undertaken for many factors;[20] (2) there was no evidence on record to rebut the presumption of constitutionality *vis-à-vis* the decision to prosecute the applicant for capital offences rather than for non-capital offences; and (3) the evidence did not show that the applicant was less culpable than the other accused in relation to their respective drug trafficking offences.[21]

As a preliminary point, there are perhaps several other local decisions worth highlighting. In *Govindarajulu Murali v Public Prosecutor*, the Court of Appeal held that "it is *not for a court* of law to consider the moral complicity of each accused person and question the Prosecution's *absolute discretion* in deciding what charge to prefer."[22] This position was subsequently adopted in *Sarjit Singh Rapati v Public Prosecutor*.[23] Then there is also *Public Prosecutor v UI*, which held that prosecutorial discretion is "an area *outside* the court's purview",[24] and *Yunani bin Abdul Hamid v Public Prosecutor*, which stated that:

> It can be said, with some force, that the Constitution, by expressly conferring *absolute prosecutorial discretion* on the Attorney-General, *does not contemplate any judicial oversight* over the exercise of such discretion.[25]

The point being made here is that there has been a discernible evolution in the jurisprudence. The older decisions tended to characterise prosecutorial discretion as an absolute power that was not amenable to any oversight, judicial or otherwise. On the other

[18] *Ramalingam Ravinthran* at [51].
[19] *Ramalingam Ravinthran* at [52], [63]. See also *Ramalingam Ravinthran* at [53], where the Court of Appeal made the broad proposition that the Attorney-General's "final decision will be constrained by what the public interest requires", as he is using his prosecutorial power "to enforce the criminal law not for its own sake, but for the greater good of society."
[20] In this regard see also *Mohamed Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR(R) 411 at [26]–[27], where the court said that the Attorney-General's prosecutorial discretion is an executive act that is subject to the classification test as set out in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 at 170.
[21] *Ramalingam Ravinthran* at [70]–[73].
[22] [1994] 2 SLR(R) 398 at [40] (emphasis added).
[23] [2005] 1 SLR(R) 638 at [46]–[47].
[24] [2007] 4 SLR(R) 270 at [6] (emphasis added).
[25] [2008] 3 SLR(R) 383 at [63] (emphasis added).

hand, decisions such as *Tan Guat Neo Phyllis* and *Ramalingam Ravinthran* have advanced an incremental progression from that position, in that prosecutorial discretion can be reviewed, but the circumstances in which it can be reviewed are fairly limited, and in any event there is a presumption of constitutionality afforded to prosecutorial decisions made by the Attorney-General. But even in *Ramalingam Ravinthran* itself we see possibly another incremental progression, albeit presented as *obiter dicter*. Essentially, the Court of Appeal thought it was necessary to address the slightly separate question as to whether the Attorney-General has a general obligation to disclose his reasons for making a particular prosecutorial decision (this became *obiter* because the applicant eventually dropped the argument), to which it said:

> Nothing in the present case can be said to raise any profound concern as to whether the Applicant was wrongly convicted of the offence with which he was charged … the Applicant is not protesting that he was wrongfully convicted. Instead, his case is that he was wrongfully prosecuted … Given the nature and width of the prosecutorial discretion, coupled with the fact that the Applicant did not avail himself of the two opportunities which he had to raise the issue that the Prosecution violated Art 12(1) in charging him … there cannot be any compelling grounds for this court to now direct the Prosecution, at this stage … to explain its reasons …
>
> Furthermore, given the manifold factors that the Attorney-General is entitled to take into account in making a prosecutorial decision, it would be wholly unrealistic for this court to proceed on the basis that the Attorney-General would be unable to point to any relevant consideration to explain his prosecutorial decisions … Indeed, it is not difficult to discern a valid consideration in the present case … It is a common and well-known practice for the Prosecution to take into account an offender's willingness to testify against his co-offender when deciding what charges to bring against the offender as compared to his co-offender …[26]

Reading between the lines, the Court of Appeal might be hinting that even if there is no legal requirement for the Prosecution to explain prosecutorial decisions, there may be some (extra-legal) value in doing so, especially since the reasons behind the decisions are usually not very mysterious.[27] Interestingly, not long before this Criminal Motion concluded, the Law Society of Singapore had organised the 2011 Criminal Law Conference, in which the keynote lecture (delivered by Lord Goldsmith QC) happened to be about prosecutorial discretion. The introductory preface to the lecture was expressed in the following terms:

> With an increasingly rights-conscious society … notions of accountability, transparency and consistency can be expected to take centre-stage in analyzing prosecutorial decisions. How can prosecutorial discretion be safeguarded whilst ensuring that decisions are principled and fair? An increasing number of countries have promulgated guidelines that provide the public an insight into the principles that guide the exercise of prosecutorial discretion, but would this result in unexpected problems and unnecessary pressure on prosecutorial agencies? How can the proper balance be struck between transparency and fact-sensitive justice? What institutional safeguards should there be to ensure that prosecutorial discretion is exercised in a principled fashion?[28]

Two broad analogies may also be drawn from recent Court of Appeal pronouncements. The first is that a judge has a duty, in particular relation to fact-finding, to give well-reasoned decisions.[29] The second is that even if certain material will not be used at trial, the

[26] *Ramalingam Ravinthran* at [77]–[78] (emphasis in original).
[27] See also KC Vijayan, "Good if A-G explains charge decisions, lawyers say", *The Straits Times*, 13 January 2011.
[28] http://www.lawsociety.org.sg/Conference/CLC2011/Topic3.htm.
[29] *Thong Ah Fat v Public Prosecutor* [2011] SGCA 65.

Prosecution has a duty to disclose it if such material is relevant.[30] Both duties may, of course, be quite readily distinguishable from the duty to explain prosecutorial decisions. For example, whereas the judicial duty to give reasons is founded in common law, there is as yet no legal prescription anywhere that mandates a duty to explain a prosecutorial decision. To cite another example, whereas the judicial duty to give reasons and the prosecutorial duty to disclose relevant evidence are essential to the establishment of truth (and therefore the safety of a conviction), the duty to explain a prosecutorial decision is not essential to such a purpose. However, the broad idea that undergirds all three duties is that all public institutions that determine fundamentally important questions (such as the life and liberty of a person) should, as far as possible, have transparent decision-making processes. This may be particularly important given the strong constitutional mandates bestowed upon the various arms of the government and the generally conservative judicial interpretations of our Constitution (that is, what is not written in it will not be lightly imported to explain what is written in it). Ultimately, the law can only say so much at any one point in time. Where the words of the law offer no further assistance, something else may have to enter the frame.

[30] *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205.